No. 14-400

IN THE

Supreme Court of the United States

CHARLES E. HARRIS, III,

Petitioner,

v.

MARY K. VIEGELAHN, CHAPTER 13 TRUSTEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER MORTGAGE COALITION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA's members frequently hold secured or unsecured claims in Chapter 13 bankruptcy cases that are converted to Chapter 7.

The Consumer Mortgage Coalition is a trade association of national mortgage lenders, servicers and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates

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[1] No party or party's counsel authored the proposed *amici curiae* brief in any part, nor did any party or party's counsel, or any person other than the *amici*, its members, or its counsel, contribute money that was intended to fund preparing or submitting this brief. Each of the parties have consented to the filing of this brief.

in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

SUMMARY OF THE ARGUMENT

The post-petition earnings that a debtor pays to a Chapter 13 trustee, who acts as disbursing agent pursuant to a plan, are the *quid pro quo* for a debtor's enjoyment of the expanded benefits that Chapter 13 provides. This premise, which permeates Chapter 13, and the language Congress adopted in several sections of the Bankruptcy Code, demonstrate that earnings submitted to the supervision and control of the trustee under a confirmed plan should be paid pursuant to the plan, even if the case is subsequently converted.

Bankruptcy Code § 1326 offers the most direct statutory authority for this rule. Section 1326(a)(1) requires Chapter 13 debtors to begin making plan payments promptly after the commencement of the case. Section 1326(a)(2), in turn, requires a Chapter 13 trustee to distribute such payments in accordance with the confirmed plan as soon as is practicable. As the majority of the bankruptcy courts addressing the question presented have concluded, these provisions govern all payments received by the trustee during the course of the Chapter 13 case, not merely the payments due in the period prior to plan confirmation. Section 1326(c) reinforces this principle by providing that the trustee shall make payments to creditors under a confirmed plan unless the plan or the confirmation order provides otherwise.

Bankruptcy Code § 348(f) makes clear that earnings submitted to the supervision and control of the trustee do not ordinarily become property of the Chapter 7 estate upon conversion. Section 348(f), however, does not direct whether the trustee should distribute these funds in accordance with the plan or refund the money to the debtor.

Similarly, §§ 1306 and 1327 do not control the question presented. A contextual reading indicates that Congress did not intend these sections to cause undisbursed plan payments to "revest" in the debtor at conversion. Nothing in the Bankruptcy Code retroactively invalidates the plan upon conversion to cause the funds to revert to the debtor either. Thus, funds already submitted to the supervision and control of the trustee prior to conversion should be paid according to the plan.

The rule adopted by the Court below, that plan payments held by the trustee at the time of conversion should be paid to creditors, does not discourage Chapter 13 filings. To the contrary, it follows the debtor's expectation at the outset of a Chapter 13 case. A corollary to the debtor's commitment of post-petition earnings to the plan is that the trustee will pay those funds to creditors as directed by the confirmed plan.

ARGUMENT

I. The Structure of Chapter 13 Provides Debtors with Broad Benefits in Exchange for Committing a Portion of Their Post-Petition Earnings to the Payment of Pre-Petition Claims

Congress has demonstrated a preference for individual debtors to attempt to repay their creditors under the terms of a plan governed by Chapter 13 of the Bankruptcy Code rather than filing under Chapter 7. *See McDonald v. Master Fin., Inc.* (*In re McDonald*), 205 F.3d 606, 614 (3d Cir. 2000). Part of the reason is that unsecured creditors often receive more under a Chapter 13 plan than in a Chapter 7 liquidation. *Id.*

Chapter 7 and Chapter 13 have significantly different structures. In Chapter 7, non-exempt pre-petition assets are turned over to a trustee for liquidation. *In re Magee*, 444 B.R. 254, 262 (Bankr. S.D.N.Y. 2011). In contrast, Chapter 13 allows debtors to retain their non-exempt pre-petition property in exchange for funding the Chapter 13 plan with a portion of their post-petition earnings. *McDonald v. Burgie* (*In re Burgie*), 239 B.R. 406, 410 (B.A.P. 9th Cir. 1999). Thus, a Chapter 13 trustee's duties are not identical to the duties of a Chapter 7 trustee. *See* 11 U.S.C. § 1302; Resp. Br. at 4. Noticeably absent from a Chapter 13 trustee's duties is the responsibility set forth in § 704(a)(1) "to collect and reduce to money the property of the estate for which such trustee serves . . . ." 11 U.S.C. § 1302(b)(1).

Using a Chapter 13 plan may enable a debtor to save a home from foreclosure, or maintain possession of a vehicle or other personal property, by curing a delinquency over time rather than all at once as state laws often provide. *In re Michael*, 699 F.3d 305, 318 n.1 (3d Cir. 2012) (Roth, J., dissenting). Moreover, subject to certain exceptions, Chapter 13 debtors may also "cram down" certain secured debts and "strip off" junior liens. *See* 11 U.S.C. §§ 506(a), 1322(b) and 1325(a)(5)(B)(ii). Further, the "superdischarge" available in Chapter 13 relieves debtors from liabilities that may not be discharged in Chapter 7. *See Mele v. Mele* (*In re Mele*), 501 B.R. 357, 368 n.10 (B.A.P. 9th Cir. 2013).

Another benefit enjoyed by Chapter 13 debtors is the protection of the automatic stay for the entire payment period of the Chapter 13 plan, usually from three to five years. *In re Valone*, 500 B.R. 645, 650-51 (Bankr. M.D. Fla. 2013). That generally prevents creditors from enforcing their contractual or legal rights against the debtor or any collateral while the Chapter 13 case continues. *See* 11 U.S.C. § 362(a).

As only a debtor can propose a Chapter 13 plan, there is no risk of a creditor filing a competing plan of full or partial liquidation. 11 U.S.C. § 1321. Upon confirmation of a Chapter 13 plan, its provisions "bind the debtor and each creditor, whether or not the creditor has objected to, has accepted, or has rejected the plan." *See* 11 U.S.C. § 1327(a). Thus, Chapter 13 plans are variously referred to as a legislative "contract," the "Chapter

13 Deal," or the "Chapter 13 bargain." *See In re Forte*, 341 B.R. 859, 869 (Bankr. N.D. Ill. 2005).

The *quid pro quo* for the expanded benefits a debtor receives in Chapter 13 is the commitment of a portion of his or her post-petition earnings to funding the Chapter 13 plan. *Michael*, 699 F.3d at 319 (Roth, J., dissenting). Congress emphasized a *quid pro quo* concept in Chapter 13 by requiring that debtors commence plan payments shortly after filing. *See* 11 U.S.C. §1326(a)(1). Chapter 13 is not intended to give debtors a "free ride." *In re Miller*, 247 B.R. 795, 797 (Bankr. W.D. Mo. 2000). Once confirmed, a Chapter 13 plan typically provides for the trustee to make deferred cash payments to pre-petition creditors from the future earnings a debtor commits to the plan. *See* 11 U.S.C. §§ 1322(a)(1) & 1326(c).

Congress said nothing about returning to a debtor funds that a debtor has paid to a Chapter 13 trustee under a confirmed plan. The only time the Bankruptcy Code mentions returning funds a Chapter 13 trustee has received from a debtor is when a plan is *not* confirmed, see 11 U.S.C. § 1326(a)(2), and that occurs whether the case is then converted to another Chapter, as in this case, or dismissed. *See id.* §§ 1307(a)–(c).

Conversion or dismissal of a Chapter 13 case after confirmation of a plan relieves a debtor of the obligation to continue making payments to a trustee. *See In re Doyle*, 11 B.R. 110 (Bankr. E.D. Pa. 1981). Nothing in Chapter 13, however, provides a debtor

with retroactive relief to, in effect, claw back payments that were made to a trustee while both the debtor and his creditors were bound by a confirmed plan. *See* 11 U.S.C. § 1327(a).

Whether creditors should receive the *quid pro quo* contemplated by the structure of Chapter 13 should not depend on whether a trustee has distributed the payments received from the debtor at the time of conversion. Such a ruling would subject creditors to undue risk resulting from "the trustee's [lack of] speed in distributing the payments" or simply a debtor's timing in converting a case relative to a trustee's payment cycle. *Harris v. Viegelahn (In re Harris)*, 757 F.3d 468, 480 n.10 (5th Cir. 2014) (citing *In re Waugh*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988)). This Court should not permit happenstance, or debtor opportunism, to determine creditors' rights to payments already submitted to a trustee and then due and owing to creditors under a Chapter 13 plan.

II. Section 1326 Reflects the Intent of Congress that the Chapter 13 Trustee Distribute Undisbursed Funds Held at Conversion as Directed by the Confirmed Plan

"In ascertaining the plain meaning of [a] statute, the [C]ourt must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Section 1326, through its express language and its fit within the design of Chapter 13, demonstrates

congressional intent that Chapter 13 trustees distribute funds held at conversion according to the confirmed plan.

A. The "Plain Meaning" of § 1326 Requires Trustees to Disburse the Funds in Question According to the Plan

Section 1326(a)(1) requires that Chapter 13 debtors commence making payments in the amounts proposed by their plans to Chapter 13 trustees within 30 days after the earlier of filing their plans or entry of the order for relief. *See* 11 U.S.C. §§ 301(b), 348(a) & 1326(a)(1). That section does not provide an end date for the payments.

Section 1326(a)(2) then provides,

> A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

11 U.S.C. § 1326(a)(2).

When no plan is confirmed,[2] Congress provided that the Chapter 13 trustee would return funds to the debtor that are "not previously paid and not yet due and owing to creditors." 11 U.S.C. § 1326(a)(2).[3] If a plan is confirmed, § 1326(a)(2) should be read to require the trustee to disburse both pre- and post-confirmation payments according to the plan because, as noted above, § 1326(a)(1)(A) is not restricted to pre-confirmation payments. Section 1326(a)(1)(A) simply provides a starting

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[2] When a Chapter 13 debtor cannot confirm a plan, the Chapter 13 case cannot continue, and the only available outcomes are conversion or dismissal. *See* 11 U.S.C. § 1307(5). Had Congress similarly intended for debtors to receive a return of funds upon conversion or dismissal *after* confirming a plan, Congress could have included a parallel provision in §§ 1326 or 348. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[3] Under the express language of § 1326(a)(2), a debtor is not entitled to the return of undisbursed moneys then "due and owing to creditors pursuant to paragraph (3)" as adequate protection payments. *See* 11 U.S.C. § 1326(a)(3). In addition, the trustee is authorized to deduct the amount of any unpaid administrative claims under § 503(b) before returning the balance of any payments made under a non-confirmed plan. *See* 11 U.S.C. § 1326(a)(2); *see also In re Inyamah*, 378 B.R. 183, 185 (Bankr. S.D. Ohio 2007). It would be inconsistent to provide for the return of all undisbursed funds to the debtor upon subsequent failure of a confirmed plan when Congress expressed clear intent not to pay all undisbursed funds to the debtor upon denial of confirmation, if those sums were then due and owing to creditors for adequate protection or as administrative claims.

point for payments. Thus, requiring a trustee to "distribute any [payment made under paragraph (1)(A)] in accordance with the plan as soon as is practicable" refers to all payments a Chapter 13 trustee receives, no matter when received. *See id.*

There are at least three different judicial interpretations of whether § 1326 answers the question presented. One line of cases concludes that § 1326(a)(2) does not apply to payments received post-confirmation. *See, e.g., In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992) (concluding that § 1326 only answers the "questions of when plan payments are to begin, the disposition of funds in the event no plan is confirmed, and who is to handle the funds"). The shortcoming in these decisions is that they overlook that § 1326(a)(1) is not limited to pre-confirmation payments.

A second line of cases, representing the majority, correctly concludes that § 1326(a)(2) instructs Chapter 13 trustees how to distribute all plan payments, regardless of when received. *See, e.g., In re Pegues*, 266 B.R. 328 (Bankr. D. Md. 2001) (collecting cases); *see also In re Parrish*, 275 B.R. 424, 433 (Bankr. D.D.C. 2002) (holding that § 1326(a)(2) mandates that a chapter 13 trustee distribute post-confirmation funds to creditors even upon case dismissal).

Other courts in a third line of cases find that § 1326(a)(2) does not directly answer the question, but read §§ 1326(a)(2) and 1326(c) together to discern a broader congressional purpose to give creditors a vested right to plan payments that a Chapter 13

trustee received after confirmation. *See, e.g., In re Smith*, 511 B.R. 612 (Bankr. W.D. Mo. 2014) ("When [Section 1326(a)(2)] is considered together with the Section 1326(c) requirement that the trustee shall make payments to creditors ... one can reasonably infer that Congress intended that post-confirmation payments made pursuant to the plan are likewise to be distributed to creditors provided for by the plan.").

Section 1326(c) fully supports this conclusion. Unless a plan or confirmation order makes someone other than a Chapter 13 trustee the disbursing agent for plan payments, this provision obligates the trustee to make payments according to the confirmed plan. *Arkison v. Plata* (*In re Plata*), 958 F.2d 918, 923 (9th Cir. 1992) (Brunetti, J., dissenting) (interpreting identical provision in Chapter 12). No provision in the Bankruptcy Code other than § 1326 addresses the distribution of funds submitted to the trustee under a confirmed plan. This means that post-confirmation Congress intended for the confirmed plan itself to control the disbursement of funds. *See* 11 U.S.C. §§ 1326(a)(2), (c).

The most logical interpretation of § 1326 is one that is consistent with its language and the structure of the Bankruptcy Code. *See In re Darden*, 474 B.R. 1, 8 (Bankr. D. Mass. 2012) (quoting *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)) ("'Statutory construction . . . is a holistic endeavor' where isolated provisions ought to be interpreted to produce a 'substantive effect that is compatible with

the rest of the law.'"). The interpretation of § 1326 that once a bankruptcy court confirms a Chapter 13 plan, payments made to a Chapter 13 trustee pursuant to the plan should be distributed according to the plan, is both consistent with the language Congress chose for § 1326 and the design of Chapter 13. Thus, the "plain meaning" of § 1326 should be respected and, because "the statute is clear and unambiguous, 'that is the end of the matter.'" *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (quoting *K mart*, 486 U.S. at 291-92).

B. Even if Not Evident from its "Plain Meaning," § 1326 Suggests Congress Intended That Creditors Have a Superior Interest in Undisbursed Funds Paid to a Trustee Under a Confirmed Plan

Even if this Court finds that the plain meaning of § 1326 does not answer the question, the Court should find, as did the Court below, that Petitioner's creditors had a right to receive the undisbursed funds held by the trustee upon conversion. The creditors hold the superior right to the funds based upon the bargain represented by a confirmed Chapter 13 plan. *Harris*, 757 F.3d at 480-81.

This Court need not characterize the interest of creditors in the funds at issue as a vested right. The Bankruptcy Code does not expressly use the term "vest" with respect to the rights of creditors to receive funds voluntarily paid by a debtor under a confirmed plan. While property of the estate is to "vest" in the debtor upon confirmation, unless the plan provides otherwise, see 11 U.S.C. § 1327(b), the

Bankruptcy Code does not characterize the payments received by the trustee as property of the estate, as discussed *infra* pp. 19–21, nor does it state that any party is vested in the funds under a trustee's supervision and control.

The Court below found that creditors' rights to funds held by a Chapter 13 trustee derive from § 1327(a): "When confirmed, the plan governs the relations of the parties and the debtor is bound to make the specified payments provided in the confirmed plan." *Harris*, 757 F.3d at 478. "Or, in other words, 'the attached wages are the *quid pro quo* that the debtor has given up during the pendency of the reorganization in return for being permitted to stave off foreclosure and cure the mortgage default, retain the use of his automobile, and enjoy the automatic stay.'" *Id.* at 480 (quoting *Michael*, 699 F.3d at 320 (Roth, J., dissenting)). Thus, if the creditors were not permitted to receive the funds paid to the trustee under the plan, they will have lost their benefit of the bargain represented by the confirmed plan while the debtor has enjoyed the benefits perceived to flow from the plan he proposed.

III. Bankruptcy Code Provisions Excluding Certain Property from the Post-Conversion Chapter 7 Estate Do Not Answer the Question Presented

Section 348(f) of the Bankruptcy Code provides that property of the converted Chapter 7 estate includes only assets that the debtor held as of the Chapter 13 petition date and over which the

debtor still retains possession or control. *See* 11 U.S.C. § 348(f)(1)(A). Petitioner argues that § 348(f) grants a debtor rights to undisbursed funds held by the Chapter 13 trustee upon conversion of the case to Chapter 7. Nothing in § 348(f), however, suggests that result.

Congress enacted § 348(f) to address an altogether different issue. As discussed in the Brief of Respondent, Congress added § 348(f) for the ostensive purpose of overruling the holding in *In re Lybrook*, a Seventh Circuit decision that adopted a rule of "once in, always in" for determining what property became part of the converted Chapter 7 bankruptcy estate. *See* Res. Br. at 33-34; *see also In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991).

Congress adopted an alternate approach by creating a default rule for converted cases, treating the Chapter 13 petition as though it was filed under Chapter 7. Under § 348(f)(1), the converted Chapter 7 estate is limited to pre-petition property that the debtor still possesses or controls at conversion. Stated differently, Congress chose not to punish debtors solely for a failed attempt at Chapter 13 by creating an enlarged Chapter 7 estate. Yet, in enacting § 348(f), nothing in the text of § 348(f) or its legislative history suggests that Congress intended to modify the structure of Chapter 13 by which debtors commit all their disposable income from their post-petition earnings as the primary means to fund a Chapter 13 plan. *See* 11 U.S.C. § 1325(b)(1) (To confirm a plan over an objection, the debtor must

commit to pay creditors all "projected disposable income" during the applicable commitment period.).

Petitioner argues that post-petition earnings held by the Chapter 13 trustee at conversion should be returned to the debtor.[4] To hold otherwise, Petitioner asserts, would create a disincentive to file Chapter 13 contrary to Congressional intent in enacting § 348(f). Pet. Br. at 11. The irony in Petitioner's position, of course, is that Chapter 13 contemplates that post-petition earnings will be the primary source of payment to creditors in Chapter 13. *See* 11 U.S.C. § 1325(b)(1)(B). Thus, requiring a trustee to turn over the funds in question should not serve as a disincentive for debtors to seek Chapter 13 relief; disbursing the funds to creditors is precisely what the parties intended at the time the payments were made. Creditors will receive only the funds the debtor earmarked for them in the plan and paid to them through the trustee when those payments were due.[5]

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[4] "Such a result not only would be patently unfair, but also contradict the reasoning of [*In re Bobroff*, 766 F.2d. 797 (3d Cir. 1985)]. [The debtor] would be in a better position (and his creditors in a worse position) than he would have been if he had initially filed for bankruptcy under Chapter 7." *See In re Michael*, 699 F.3d 305, 320 (3d Cir. 2012) (Roth, J., dissenting).

[5] Many districts, known as "conduit mortgage districts," require debtors to make mortgage payments through the Chapter 13 trustee, rather than directly to the creditor outside the plan. *See, e.g.*, Local Bankr. R. 3015-1(b) (S.D. Tex.); *see also In re Heinzle*, 511 B.R. 69, 73–74 (Bankr. W.D. Tex. 2014). It would be inconsistent to permit secured creditors paid directly to retain payments, but require a trustee to return undisbursed funds paid to the trustee as a conduit.

Nor would paying creditors any funds held by the trustee under the plan prior to conversion effectively nullify the "bad faith" exception in § 348(f)(2). Under that exception, a bankruptcy court can order other post-petition earnings or assets, not simply those earnings the debtor had committed to and paid under a Chapter 13 plan, to become property of the Chapter 7 estate.

The "bad faith" exception was not enacted to address the disposition of post-petition earnings intended for plan payments. Prior to 1994, the Bankruptcy Code already contemplated that post-petition earnings, to the extent not needed for living expenses, ordinarily would be paid to creditors in the plan. *See* 11 U.S.C. §1325(b). In 1994, Congress added the "bad faith" exception in § 348(f)(2) so that bankruptcy judges would have the discretion "to order that *all* property held at the time of the conversion shall constitute property of the estate in a converted case." H.R. Rep. No. 835, 103d Cong. 2d Sess. 57 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 3366 (emphasis added). Thus, through § 348(f)(2), Congress empowered bankruptcy judges to address potential abuses of the "absolute" right to convert a case to Chapter 7 in the event a debtor were, for example, to receive a substantial asset post-petition and yet, in bad faith, elect not to modify the plan to share that asset with creditors. *See, e.g., Moser v. Mullican* (*In re Mullican*), 417 B.R. 389 (Bankr. E.D. Tex. 2008), *aff'd*, 417 B.R. 408 (E.D. Tex. 2009) (finding case was converted in bad faith where debtors were current on their plan payments, inheritance would have paid creditors in full, debtors

instead paid family member debts, spent portion of inheritance, and made false representations about use of proceeds).[6]

IV. Undisbursed Plan Payments Committed to the Supervision and Control of the Trustee Under a Confirmed Plan Do Not "Revest" in the Debtor at Conversion

The Court below correctly concluded that the funds in question do not "revest" in the debtor at conversion. *Harris*, 757 F.3d at 478 n.8. Once the debtor makes payment to the trustee from his earnings under the confirmed plan, the debtor is not entitled to possession nor is the debtor vested with any interest in those payments. *Id.* at 477–78. The Court below also declined to hold that creditors had a vested interest in undisbursed funds in the hands of the trustee, as other courts have found. *See, e.g., In re Waugh*, 82 B.R. 394, 400 (Bankr. W.D. Pa. 1988) (holding that creditors have a "non-divestible

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[6] Most reported decisions addressing the bad faith exception in § 348(f)(2) involve a debtor obtaining a significant asset during the Chapter 13 case, often through inheritance, similar to the facts in *Lybrook*. *See, e.g., In re Castillo*, 508 B.R. 1 (Bankr. W.D. Tex. 2014) (post-petition inheritance); *In re Doetsch*, No. 04-63998, 2007 WL 2702645 (Bankr. N.D.N.Y. Sept. 12, 2007) (same); *In re Messer*, No. 96-550617, 2000 WL 33673748, at *3 (Bankr. M.D.N.C. Nov. 22, 2000) (same); *see also In re Siegfried*, 219 B.R. 581 (Bankr. D. Colo. 1998) (right to overbid at foreclosure); *In re Bejarano*, 302 B.R. 559 (Bankr. N.D. Ohio 2003) (post-petition tax refund and personal injury claim); *In re Wiczek-Spaulding*, 223 B.R. 538 (Bankr. D. Minn. 1998) (separation payment); *In re Reeves*, 509 B.R. 35 (Bankr. S.D. Tex. 2014) (retroactive benefit payment, monthly income from new business venture and collection of large receivable).

right to plan payments"); *In re Lennon*, 65 B.R. 130, 136, 137 (Bankr. N.D. Ga. 1986) (same). Nevertheless, the Court below correctly held that a confirmed plan directs what a trustee must do with funds paid by the debtor under the plan. Creditors are entitled to the *quid pro quo* of the debtor's enjoyment of the plan and thus, between creditors and Petitioner, creditors have a superior claim to the funds. *Harris*, 757 F.3d at 481.

A. The Debtor is Not Vested in Payments Made to the Trustee from Post-Petition Earnings under a Confirmed Plan

This Court, like the Fifth Circuit, should reject the notion that the debtor was vested with an interest in the funds at issue. As the Court below explained, "[t]hese payments are specifically earmarked and set aside for distribution to creditors provided for by the confirmed plan. To the extent that the confirmed plan provides for payment from debtor's future earnings and the debtor actually makes payment to the trustee pursuant to that plan, the debtor is not entitled to possession nor is the debtor vested with title to such payments." *Harris*, 757 F.3d at 478 (quoting *Lennon*, 65 B.R. at 136).

It is axiomatic that, once turned over to the Chapter 13 trustee under a confirmed plan, moneys from earnings are under the "supervision and control of the trustee," as contemplated by § 1322(a)(1), and the debtor no longer has possession or control of the funds.

Similarly, a debtor no longer has a vested interest in the funds. Once a plan is confirmed, the Chapter 13 trustee is required to pay to creditors funds under the proposed plan received both pre-confirmation and post-confirmation. *See* 11 U.S.C. § 1326(a)(2) ("[T]he trustee shall distribute any such payment in accordance with the plan as soon as is practicable."); *see also* § 1326(c) ("Except as otherwise provided in the plan or the order confirming the plan, the trustee shall make payments to creditors under the plan.").

B. Plan Payments Made to the Trustee Are Not Property of the Estate, and Conversion Does Not "Revest" Plan Payments in the Debtor

With no right to possession and no vested interest immediately following submission of earnings to the trustee, Petitioner asserts that conversion "revested" the debtor with such rights by operation of § 1327(b) and the order confirming Petitioner's plan. Pet. Br. at 13. That result is wholly unsupported by the language and purpose of the vesting provision, § 1327(b).

First, § 1327(b) provides that confirmation is the event that vests all property of the estate in the debtor (absent a provision to the contrary in the plan or the confirmation order).[7] The statute does not

[7] Nothing about the vesting provision in Petitioner's plan alters the vesting analysis with respect to payments made to the trustee under the plan. *See, infra*, pp. 22–24.

mention conversion and does not itself cause any vesting to occur upon conversion.

Second, the vesting provision in § 1327(b) applies only to property of the estate, which does not include funds previously submitted to the trustee under the plan.[8] Section 1306 determines what is property of the estate in Chapter 13, and includes "earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed, or converted . . . ." 11 U.S.C. §1306(a)(2). A debtor's post-petition earnings, however, lose their character as "earnings" when they are paid to the Chapter 13 trustee pursuant to a confirmed plan. As the dissent in *Michael* observed, when in the hands of the trustee, "we are not dealing simply with wages here but with that portion of the wages that had been attached under the plan and paid to the trustee for distribution to the creditors."[9] *Michael*, 699 F.3d at 320. Once paid

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[8] A number of courts have directly or indirectly reached this conclusion by holding that creditors are vested with an interest in funds submitted to the control and supervision of a trustee pursuant to a confirmed plan. *See In re Verdunn*, 210 B.R. 621, 626 (Bankr. M.D. Fla. 1997); *In re Halpenny*, 125 B.R. 814, 816 (Bankr. D. Haw. 1991); *Ledford v. Burns* (*In re Burns*), 90 B.R. 301, 304-05 (Bankr. S.D. Ohio 1988); *In re Lennon*, 65 B.R. 130, 137 (Bankr. N.D. Ga. 1986); *see also In re Parrish*, 275 B.R. 424, 432 (Bankr. D.D.C. 2002) ([T]he estate could alternatively be viewed as continuing to have legal title to the funds, with the creditors vested with ownership of the equitable interest in the funds as beneficiaries of a trust created by the terms of the confirmed plan.").

[9] The conclusion that payments made to a trustee under a confirmed plan are not property of the estate is consistent

to the trustee, those funds can no longer be characterized as "earnings" any more than one would characterize as "earnings" wages previously spent on milk and bread, or used to pay post-petition mortgage payments or rent.

Third, if previously submitted funds were to be viewed as property of the estate, §§ 1306 and 1327 would conflict with the clear direction provided in § 1326 on how trustees are to disburse funds submitted to their supervision and control. Specifically, § 1306(b) provides a default rule that "the debtor shall remain in possession of all property of the estate." Section 1327(b) establishes a default rule that "the confirmation of a plan vests all of the property of the estate in the debtor." Section 1327(c) further provides that, absent a plan or confirmation order providing otherwise, "property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan." Reading these statutes to treat plan payments submitted to the trustee as property of the estate would cause § 1306(b) to grant possession to the debtor of pre-confirmation payments under the plan. Similarly, § 1327(b) would vest in the debtor pre-confirmation plan

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with the duties Chapter 13 trustees are and are not given by statute. As discussed, *supra* p. 4, nothing in § 1302 suggests that the Chapter 13 trustee is to collect property of the estate under a confirmed plan. The trustee collects funds via monthly payments made by the debtor out of estate property that vested in the debtor upon confirmation. *See* 11 U.S.C. § 1322(a)(1). The funds paid, however, once under the trustee's supervision and control, are not property of the estate because they no longer are post-petition earnings.

payments free of any interest of creditors despite later confirmation of the plan. Those results would directly conflict with § 1326(a)(2)'s express instruction to the trustee to pay such funds "in accordance with the plan as soon as is practicable." 11 U.S.C. § 1326(a)(2). The proper and more harmonious reading of those statutes is that Congress intended to address estate assets, which will remain in the debtor's possession and control during the pendency of the Chapter 13 case, not to direct the distribution of payments submitted to the trustee under a proposed or confirmed plan. Section 1326, titled "Payments," already accomplishes that task.

C. Neither Petitioner's Plan Nor the Confirmation Order Dictate a Different Result

Some Chapter 13 plans and confirmation orders, including in Petitioner's case, delay the vesting of property of the estate in the debtor. The "delayed vesting" provision is used in some jurisdictions to provide a debtor with more protection from post-petition creditors than otherwise may be available under the automatic stay if vesting occurred at confirmation.[10] *See In re Jemison*, No. 07-40761, 2007 WL 2669222, at *3 (Bankr. N.D. Ala. Sept. 6, 2007).

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[10] If property of the estate is vested in the debtor and thus no longer property of the estate, it would not be subject to the protections of the automatic stay under § 362(a)(3) or (a)(4), which prohibits acts against property of the estate by holders of both pre- and post-petition claims.

The "delayed vesting" provision in the order confirming Petitioner's plan provides, "Such property as may revest in the Debtor shall so revest only upon further Order of the Court or upon dismissal, conversion, or discharge."[11] J.A. 48. The Court below declined to "define with precision the property that 'may revest in the Debtor.'" *See Harris*, 757 F.3d at 478 n.8. According to the Court, such a ruling was unnecessary because, by requiring Petitioner "to pay part of his wages to the trustee for distribution to creditors, the order clearly did not contemplate that such payments would revest in" Petitioner.[12] *Id.* Stated differently, nothing in the order or in the vesting provision, § 1327(b), suggests that Congress intended for earnings to make a round-trip, that is, to be possessed and vested in the

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[11] Petitioner's plan is based on the form Chapter 13 plan published by the U.S. Bankruptcy Court for the Western District of Texas, San Antonio Division. *See* Chapter 13 Plan Form – San Antonio Division, *available at http://www.txwb.uscourts.gov/sites/default/files/file/order_ch13_pln_san_antonio.pdf* (last visited, Mar. 3, 2015). The "as may revest" language in the confirmation order is not part of the form chapter 13 plan. A number of other jurisdictions have adopted form Chapter 13 plans that do not contain the "as may revest" language, and explicitly provide, "*All* property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge, or conversion." *See, e.g.*, *Harris v. Washington Mutual Home Loans, Inc.* (*In re Harris*), 297 B.R. 61, 72 (Bankr. N.D. Miss. 2003) (emphasis added).

[12] Funds paid to the trustee under the plan *post*-confirmation are not funds "as may revest" in the debtor; they are funds that, but for the language of Petitioner's plan, would have vested in the debtor at confirmation, but were subsequently paid out of the estate to the trustee under the plan.

debtor at confirmation, but after being voluntarily paid to the trustee under the plan, to vest in the debtor again following conversion.

Regardless of when vesting occurs under a plan or confirmation order, payments that are made from the debtor's earnings to the trustee will not subsequently vest or revest in the debtor. Congress intended that the confirmed plan, as a "court-sanctioned contract that binds the chapter 13 debtor and its creditors," *In re Stuart*, 402 B.R. 111, 126 (Bankr. E.D. Pa. 2009), govern the rights of creditors to funds submitted to the supervision and control of the trustee, regardless of when property of the estate vests in the debtor. Both the debtor and his creditors are bound to the terms of a confirmed plan, 11 U.S.C. § 1327(a), and Petitioner's plan called for money paid to the trustee from Petitioner's earnings to be distributed to creditors by the trustee. *See* J.A. 27 ("From the monthly payments described above, the Chapter 13 trustee shall pay the following allowed claims in the manner and amounts specified").

D. Conversion Does Not Invalidate Creditors' Rights to Funds Previously Submitted to the Trustee Under a Confirmed Plan

The fact that the proponent of a confirmed plan may later decide to convert the case to another chapter does not change the parties' rights concerning payments made to the trustee while the plan was effective. Petitioner's resort to § 348 to

support his "revesting upon conversion" argument is unavailing. Consistent with congressional purpose that § 348 not serve as "a source of disruption, but, instead, preserves the continuity of the bankruptcy proceedings," conversion does not invalidate any action taken by the debtor or creditors in the superseded case pursuant to a plan. *In re Verdunn*, 210 B.R. 621, 625 (Bankr. M.D. Fla. 1997).

Conversion does not vacate the Chapter 13 plan or have retroactive effect. *See* 11 U.S.C. § 1330 (omitting conversion as a triggering event for vacating an order of plan confirmation); *see also In re Markham*, 504 B.R. 1, 7 (Bankr. D. Mass. 2013) ("Nowhere in § 348 nor in any other provision of the Bankruptcy Code is there a suggestion that conversion from chapter 13 to chapter 7 vacates a confirmed plan"); *accord Behles-Giddens, P.A. v. Raft (In re K.D. Co.)*, 254 B.R. 480, 487 (B.A.P. 10th Cir. 2000) (chapter 11). Otherwise, Chapter 13 would prove unworkable as secured creditors, for example, would face the prospect of returning collateral surrendered under a confirmed plan upon conversion. *See In re Smith*, 511 B.R. 612, 616-17 (Bankr. W.D. Mo. 2014). Thus, while conversion relieves a debtor of the obligation to contribute additional funds to the plan, conversion does not invalidate a confirmed plan's direction that funds submitted to the trustee be paid to creditors.

This result is evident from the Chapter 13 trustee's role as disbursing agent. Once the debtor submits payments to the trustee's supervision and control, "[t]he trustee is the conduit for the funds to

get to the creditors." *Id.* at 317. Unlike the duties of a Chapter 7 trustee, "[t]he functions of the chapter 13 trustee are basically administrative, *e.g.*, review plans, advise the court on plans, and act as *disbursing agent*." *The Travelers Indemnity Co. of Illinois, Inc. v. Griner (In re Griner)*, 240 B.R. 432, 438 (Bankr. S.D. Ala. 1999) (emphasis added).[13] Thus, rights to the funds submitted to the trustee, acting as disbursement agent under a confirmed plan, already have been determined at conversion, and nothing in § 348 suggests that Congress intended to alter those rights *ex post facto*.

Practicalities also support this result. If Chapter 13 trustees were required to return undisbursed plan payments upon conversion, trustees would face unwarranted pressure to accelerate the distribution of payments. This could jeopardize equitable distribution of payments to all

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[13] The Bankruptcy Code presumes that the Chapter 13 trustee will act as "disbursing agent" under the plan, but the debtor may act as disbursing agent under certain circumstances. *See* 11 U.S.C. § 1326(c); *Mendoza v. Temple-Inland Mortgage Corp. (In re Mendoza)*, 111 F.3d 1264, 1269 (5th Cir. 1997). There is no workable distinction between payment to creditors directly, in cases where the debtor acts as his own disbursing agent, and submission of earnings to the supervision and control of the Chapter 13 trustee for the same purpose. Each instance involves a voluntary payment of the debtor "in order to fulfill his obligations under the reorganization plan and in exchange for the benefits he derives from the plan." *Michael*, 699 F.3d at 320. Petitioner does not argue that payments made directly to creditors are recoverable upon conversion, for good reason, and the same rule should apply to earnings submitted to the supervision and control of the trustee.

creditors of the same priority, as well as drive up the costs of administration.[14]

V. Section 348(e) Does Not Terminate a Chapter 13 Trustee's Obligation to Distribute Undisbursed Funds

Finally, a Chapter 13 trustee undoubtedly has duties to perform following conversion. *See* Fed. R. Bankr. P. 1019(5). Among other duties, monies held under the trustee's supervision and control, whether submitted under a proposed or a confirmed plan, must be paid by the trustee to someone.

Read literally, § 348(e) would prohibit Chapter 13 trustees from performing any tasks immediately upon conversion. The Court below reasonably observed that § 348(e) "cannot be taken too literally." If read literally, upon conversion a Chapter 13 trustee would be equally powerless to disburse funds to a debtor or creditors. This interpretation is unacceptable because it would lead to an absurd, or at least unreasonable, result. *See United States v. Am. Trucking Assns.*, 310 U.S. 534, 543 (1940).

The more reasonable interpretation of § 348(e) is that "there cannot be two trustees administering

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[14] In order to ensure equitable distribution to creditors, Chapter 13 trustees sometimes accumulate payments, rather than distribute the funds immediately. *Michael*, 699 F.3d at 316. This case is one example. Knowing that the mortgagee in this case might obtain relief from stay to liquidate its collateral in satisfaction of its claim, the Chapter 13 trustee held payments rather than face the prospect of seeking to recover the funds after payment. *See* Pet. App. 4a.; Resp. Br. at 10.

the same estate under the provisions of the new chapter." *Parrish*, 275 B.R. at 430. While there is evidence of a desire to avoid jurisdictional overlap, there also is evidence that Congress did not intend Chapter 13 trustees to have no further role in the case after conversion. *See, e.g.*, 11 U.S.C. §1326(a)(2) (requiring a Chapter 13 trustee to return funds to the debtor if the case is converted pre-confirmation, but subject to deducting adequate funds to pay allowed administrative expense claims); *see also* Fed. R. Bankr. P. 1019(5)(B)(ii) (requirement to file a final report and account with the United States Trustee). Indeed, the post-conversion tasks performed by the Chapter 13 trustee are necessary for the bankruptcy scheme to work seamlessly. The Court below correctly concluded that one of the remaining roles upon conversion is for the Chapter 13 trustee to distribute remaining funds to the parties with the best claim to them—creditors in this case.

Urging that the Fifth Circuit's approach in interpreting § 348(e) yields inconsistency as applied to different chapters, Petitioner argues that it would be absurd for a Chapter 7 trustee to distribute funds to creditors after conversion *from* Chapter 7. Pet. Br. at 12. Yet, the unique roles of Chapter 7 and Chapter 13 trustees explains any perceived inconsistency. The Chapter 13 trustee's role of the "disbursing agent" for monthly plan payments is entirely unique to Chapter 13.[15] There is nothing

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[15] Chapter 7 trustees also have persisting, albeit different, roles in cases converted *from* Chapter 7. *See In re Czykoski*, 320 B.R. 385, 390 (Bankr. N.D. Ind. 2005) (holding

inconsistent in reading § 348(e) to permit a Chapter 13 trustee to complete a task unique to that chapter. *See In re Redick*, 81 B.R. 881, 886 (Bankr. E.D. Mich. 1987) (at conversion, "the Chapter 13 trustee is, at the very least, a custodian of funds").

Petitioner further attempts to draw support from a perceived inconsistency that would arise when a Chapter 13 debtor dismisses a case, rather than converts to Chapter 7. Upon dismissal, Petitioner argues, § 349 requires the Chapter 13 trustee to disburse any post-petition wages on hand to the debtor. *See* 11 U.S.C. §349(b)(3). Petitioner theorizes that it would be illogical to return funds to a debtor in the event of dismissal but not upon conversion.

Petitioner's position that § 349 leads to a different result is not grounded in any specific statutory command. Similar to § 348, discussed *supra* pp. 24–26, § 349 is silent on whether funds in the hands of the Chapter 13 trustee should be paid to creditors upon dismissal. Several courts have concluded that § 349 does not instruct Chapter 13 trustees to return undisbursed funds to debtors for many of the same reasons that such an outcome is inappropriate upon conversion. *See, e.g., In re Criscuolo*, No. 09-14063, 2014 WL 1910078 at *8 (Bankr. E.D. Va. May 13, 2014) (holding that § 1326(a)(2) grants creditors the right to payment of the funds notwithstanding § 349(b)(3)); *In re Parker*, 400

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that Chapter 7 trustee retains standing to file motion to dismiss and assert claims in case converted from Chapter 7).

B.R. 55 (Bankr. E.D. Pa. 2009) (same); *In re Parrish*, 275 B.R. 424 (Bankr. D.D.C. 2002) (same).

Even if undisbursed funds should be returned to the debtor upon dismissal, which *Amici* dispute, there are ample reasons to justify a different result upon conversion. First, § 349(b)(3) "re-vests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." This provision has the impact of returning, to the extent possible, the debtor and creditors to the *status quo ante*. *See Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 238 (5th Cir. 2012). Upon dismissal, creditors' rights are restored. *See id.* The automatic stay is lifted to allow creditors to undertake collection action against the debtor and their collateral. Section 348, governing conversion, has no such language. Rather, Congress intended conversion to be a continuation of the bankruptcy case. *Verdunn*, 210 B.R. at 625. Upon conversion, although the Chapter 13 plan no longer will govern the conduct of the parties, the automatic stay continues and creditors are not restored to their pre-petition positions to the same extent as upon dismissal.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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